IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 606 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

PRAKASH D SHETH .....Applicant

Versus

STATE OF GUJARAT .....Opponent

Appearance:

MR KB ANANDJIWALA for Petitioner

MR KP RAVAL ADDL. PUBLIC PROSECUTOR for opponent.

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 20/01/98

ORAL JUDGEMENT

Rule. Mr. K.P.Raval, learned APP waives the service of the rule for and on behalf of the State of Gujarat. Both the learned advocate urged to hear the application today and accordingly this revision application is heard.

2. This revision application is directed against the

order dt. 10th December, 1997 passed by the learned J.M.F.C. at Gandhidham, during the course of hearing, while recording the evidence of Sushilaben Moraghmal Asnani in Criminal Case No. 1265 of 1984 on his file, whereby the prosecution is permitted to put certain questions to it's witness for the purpose of refreshing her memory.

3. In order to appreciate the relevant rival contentions, few facts may be stated. Against the petitioner, a complaint registered as Criminal Case No. 1265 of 1984 came to be filed in the court of the learned Judicial Magistrate First Class at Gandhidham. It was the complaint in connection with the offence punishable under Secs.491, 420, 467, 468, 471, 477A and 201 of the Indian Penal Code. When it was ripened for hearing, the prosecution wanted to examine Sushilaben Moraghmal Asnani in connection with the cheque received and presented before the State Bank of India at Gandhidham. After deposing certain facts about the cheque presented at the Counter, the witness serving in the State Bank of India at Gandhidham, could not recollect each and every fact, she had stated before the Police, and therefore, whatever questions lateron were asked, she showed her ignorance, submitting that she was not recollecting the facts and events. Thereafter, it seems that her statement recorded by the Police during the course of the investigation was read over to her and she admitted that the said statement read over to her was given by her before the Police and whatever was stated therein was true. Thereafter, certain questions were put to the witness to which the witness was not in a position to answer as she was not remembering the facts. The learned Assistant Police Prosecutor in charge of the prosecution then urged to permit him to put up certain questions, without declaring the witness hostile. That was strongly opposed. The learned Judge, hearing both the advocates, held that as many years had rolled by then, the witness was not remembering the facts which she stated before the Police, and therefore, to refresh her memory, permission to make use of the Police Statement was required to be given. Accordingly, the permission was granted, passing the order in the deposition being recorded. The said order has been challenged in this present revision.

4. Mr. Anandjiwala, the learned advocate representing the petitioner has submitted that the order of the learned Judge permitting to use the statement recorded by the Police u/s 161 of Criminal Procedure Code during the course of the investigation for the purpose of refreshing memory of the witness was not legal and as the

evidence in that regard was inadmissible, the learned Judge ought not to have granted the permission in question passing the impugned order. According to him, in view of Sec. 162 of Criminal Procedure Code, such statement cannot be used for any purpose except specifically provided in the Code, and that is only to contradict such witness in the manner provided by Sec. 145 of the Indian Evidence Act. Hence except for the purpose of contradiction, the statement recorded by the Police during the course of investigation under Sec. 161 cannot be used for the purpose of refreshing memory of the witness, as the same was specifically barred vide Sec. 162 of the Criminal Procedure Code, or say not specifically permitted. On behalf of the respondent, Mr. Raval, the learned APP has submitted that the order in question being inter-locutory order, the revision in view of Sec. 397(2) was barred and on that count alone, this revision application is liable to be dismissed. He has also argued that the contention advanced on behalf of the petitioner is not acceptable.

5. The expression 'inter-locutory order' is not defined in the Criminal Procedure Code. Considering the object of the provision, the most apt appropriate and proper meaning that can be spelt out is that the order which is purely interim or of a temporary nature which does not adjudicate or touch the important rights and liabilities of the parties can be termed inter locutory order. In other words, the order which does not determine the rights and obligations of the parties finally can be described as the inter locutory order. However, it may be stated that intermediate or quasi-final order which determines a particular issue finally at any stage of the hearing will not fall within the ambits of interlocutory order.

6. If the questions which are not permissible in the eye of law are ordered to be permitted by the Court to be put to while examining the witness, and answers given are recorded, such order can be termed purely interim or temporary in nature, because even if impermissible evidence is recorded, there is no final adjudication of the issue determining the rights and obligations of the parties or no legal complextion thereby is given to the issue, the same is to be done while finally appreciating the evidence for the purpose of pronoucing final verdict. It may be stated that at the time of arguments, the party can submit that the evidence being contrary to law may be kept out of consideration, and court shall then decide the issue whether that evidence should be discarded or taken into consideration.

7. In view of such law, the order in question is interlocutory order, and therefore, next question that arises for consideration is whether it is open to this court to examine the merits of the order under Sec. 482 of the Criminal Procedure Code ? What follows from a conjoint reading of Sec. 397 and 482 of the Criminal Procedure Code is that if the High Court is satisfied that to prevent miscarriage of justice or for securing the ends of justice, grant of relief is necessary, it is not precluded from treating the petition u/s. 397 as a petition u/s. 482. Where there is patent or glaring injustice i.e. the order is manifestly illegal, or irregular, or improper, or perverse, or without jurisdiction, calling for prompt redressal, the powers u/s. 487 can be exercised. If the mandatory requirements are set at naught, the powers can also be exercised. For securing the ends of justice, there is no limitation on the exercise of inherent powers u/s. 482 of Criminal Procedure Code.I will, therefore, examine the merits of the impugned order, though apparently it appears to be inter-locutory. Before I proceed, it may be stated that such exercise or powers must be thrifty and chary, or with restraint, and not ordinarily as a matter of course.

8. It may be noted that the permission to put up the question by showing and reading over the statement, is not granted, under Sec. 154 of the Evidence Act which vests discretion in the court to permit the party to put up the question which can be put up in cross examination by the adverse party without declaring the witness hostile. But in view of Sec. 159 of the Evidence Act, to refresh the memory of the witness, the permission to ask the question is given. Whether such permission can in law be granted is a crucial question raised in this revision application. Under Sec. 159 of the Indian Evidence Act, a witness may, while under examination, refresh his memory or can be permitted to refresh his memory, referring to any writing made by himself at the time of transaction concerning which he is questioned or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory. It is open to the court to permit to look at the document so as to refresh the memory, if the witness refers to any other writing made by any other party and read by the witness within the aforesaid period, if when he reads it, he knew it to be correct. What becomes clear is that under Sec. 159 of the Indian Evidence Act, if the witness has made the writing or executed the document, he can be permitted to use the same for

refreshing his memor. Even if writing is made by any other person and is read by the witness, the same can be also permitted to be used for refreshing the memory. The court has to exercise the discretion judiciously and when the court exercises the discretion in such matter, ordinarily this court cannot interfere in the order passed, unless it is found that exercise of the discretion is arbitrary, perverse or capricious and not legal and judicious. Keeping such law in mind, I would now refer Sec. 162 of the Criminal Procedure Code, because in this case, the statement recorded by the Police under Sec.161 of the Criminal Procedure Code, during the course of the investigation, is permitted to be used for the purpose of refreshing memory. As pointed out hereinabove, the statement recorded by the Police during the course of the investigation, cannot be used for any purpose except for the purpose of contradiction in the manner provided by Sec. 145 of the Indian Evidence Act and for no other purpose. When the plain reading of Sec. 162 shows that the statement has to be used for the purpose of contradiction and not for any other purpose, grant of permission for the purpose of refreshing memory is clearly hit by Sec. 162 and therefore, the exercise of the discretion cannot be termed judicious or legal, but can be termed perverse or arbitrary and the same is required to be struck down on that count.

9. I may state in detail referring certain authorities. It is laid down in the case of RAMDEO AND OTHERS VS. STATE. 1963 (2) Cr.L.J.198 that permitting the prosecution, to refresh the witness's memory by reading out his statement recorded during the investigation, is wholly illegal and should never be permitted. The prohibition except for the purpose mentioned in Sec. 162 of the Criminal Procedure Code, is absolute and Sec. 159 of the Indian Evidence Act is not intended for this purpose otherwise the provisions of Sec.162 Criminal Procedure Code will be rendered completely nugatory. In the case of RAMESHWAR SINGH VS. STATE OFJAMMU AND KASHMIR, AIR 1972 SC 102 = 1972 Cr.L.J. 15, it is held that the contents of statements of witnesses recorded under Sec. 161 of the Criminal Procedure Code during the course of the investigation, cannot be taken into consideration for any purpose not even for finding corroboration of the statements made in the Court except provided in Sec. 162 of the Criminal Procedure Code. This court in the case of STATE OF GUJARAT VS. CHAUDHRI PATEL BECHAR PUNJAJI AND OTHERS, VII G.L.R. 227 has made it clear that statement recorded by Police under Sec. 161 of the Criminal Procedure Code

can only be in view of Sec.162 Cr.P.Code use for contradicting the maker of the statement and none-else. Again in another case of MOHAN BANJARI AND OTHERS VS. EMPERIOR. AIR 1933 Nagpur 384, What is made clear is that the statement recorded by the Police during the course of investigation cannot be used by any party in the inquiry or trial except as provided in section 162 Cri.P.Code namely for the purpose of contradiction in the manner provided by Sec. 145 of the Indian Evidence Act. The prosecution cannot ask its witness to what statement he made to the Police. Of course, it is open to the prosecution to know whether the witness has made any statement but not what fact he stated and whether he was questioned by the Police, nothing further.

10. In view of such law made clear by the above stated citations, the use of the statement recorded by the police during the course of the investigation, cannot be made for the purpose of refreshing the memory. It can be for the purpose of contradicting in the manner provided by Sec. 145 of the Indian Evidence Act. In the case on hand, the permission for contradicting the witness in the manner provided vide Sec. 145 of the Indian Evidence Act was not sought for, but keeping Sec. 159 of the Indian Evidence Act, permission to refresh the memory of the witness using the statement was sought for which is hit by Sec. 162. The discretion exercised by the learned Judge is, therefore, illegal, and so the order is required to be set aside.

10. Faced with such situation, Mr. K.P.Raval, the learned APP drew my attention to the decision of this court rendered in the case of KANBI VAGHJI SAVJI vs. STATE OF GUJARAT, AIR 1968 GUJARAT 11. The said decision will be of no help to Mr. Raval, the learned APP. What is held in that case is that if the witness refreshes his memory by reading his statement before giving evidence in the court, his evidence is no doubt admissible as the same is not hit under Sec. 162 of Criminal Procedure Code. At the most, evidence of such witness can be shaken as the witness is likely to depose to a particular incident on the basis of what he had read the statement before he stepped into the witness-box for giving evidence. In that case, his evidence can be stamped as the statement made on the basis of the statement read by the witness and not on the basis of what he actually recollected about the incident. When at the time of argument, the evidence is assailed submitting that witness had deposed after reading the statement before he stepped into the witness box, it is open to the court to discard that evidence from consideration and decide the

issue keeping that portion of evidence, out of consideration. Here in this case, the witness did not read her statement before stepping into the witness-box for giving evidence, but when she was deposing during the course of her evidence, the use of her statement was sought to be made for the purpose of refreshing her memory. If that is so, the consideration will be different as made clear by the Privy Council in the case of ZAHIRUDDIN VS. EMPEROR, AIR 1947 Privy Council, 75 and the consideration will be which I have hereinabove discussed. The contention advanced by the learned APP, therefore, does not gain a ground to stand upon.

9. For the aforesaid reasons, the learned J.M.F.C. has erred and fell into error in permitting the prosecution to use the statement of the witness so as to refresh her memory. No doubt, it was open to the learned Magistrate to exercise the discretion and permit the prosecution to put certain question without declaring the witness hostile but as that is not done; on the contrary, invoking Sec. 159 of Evidence Act, powers are exercised which is not at all in consonance with the mandate of Sec. 162 of Criminal Procedure Code, the order in question is, therefore, liable to be set aside.

10. For the aforesaid reasons, this revision application is allowed. The order in question being illegal is set aside. The learned Magistrate shall now proceed further with the case recording the evidence in accordance with law.

(ccs)